United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1554

To be Argued by
SANDOR FRANKEL

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

against

MICHAEL PATERNO, GEORGE DENTI
and PATERNO AND SONS, INC.,
Defendants-Appellants.

BRIEF FOR APPELLANT GEORGE DENTI

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BRIEF FOR APPELLANT GEORGE DENTI

Issues Presented

1. The trial Court erred in permitting "expert" handwriting testimony to be introduced against appellant Denti where the Government failed to prove that one of the "exemplars" upon which the "expert" relied in making his handwriting analysis was in fact written by Denti.

2. The trial Court erred in permitting the prosecutor to elicit testimony before the jury that appellant Denti had declined to furnish handwriting exemplars to the revenue agent and special agent until he had an opportunity to consult with counsel to ascertain his rights.

3. The indictment should have been dismissed because the Government deprived appellants of their right to an administrative conference within the Internal Revenue Service as guaranteed to appellants by published regulations of the Internal Revenue Service.

4. Appellant Denti was denied a fair trial in accordance with due process by reason of the prejudicial actions of the trial Court in demeaning his defense in the presence of the jury and in erroneously hampering the presentation of his defense.

Statement of Proceedings

Appellant George Denti was charged in six counts of a nine-count indictment filed May 3, 1973, which named as co-defendants Michael Paterno and Paterno & Sons, Inc. Counts 2-5 charged all three appellants with having attempted to evade the corporate income taxes of Paterno & Sons, Inc. for each of the fiscal years ending February 28, 1967 through February 28, 1970, in violation of 26 U.S.C. §7201. Count 1 charged all appellants with having conspired to evade the corporation's income taxes for those years and for the fiscal year ending February 28, 1966, in violation of 18 U.S.C. §371. Count 9 charged appellant Denti with having made and subscribed the corporate income tax return for the fiscal year ending February 28, 1970, knowing such to be materially false in that said return allegedly overstated the corporation's equipment rental and equipment repair deductions, in violation of 26 U.S.C. §7206(1) (Counts 6-8 charged appellant Paterno with the same violation of 26 U.S.C. §7206 (1) for the fiscal years ending February 28, 1967 through February 28, 1969).

Trial of the action against all appellants commenced on February 6, 1974 before the Hon. Marvin E. Frankel and a jury. On February 22, 1974 the jury returned a verdict finding all defendants guilty as charged in all counts. Appellants Denti and Paterno were each sentenced to nine months in prison on each count, the sentences to run concurrently; in addition, appellant Denti received a fine of $2,000.00 on counts 1-5, the fines to be cumulated, and appellant Paterno received a fine of $2,500.00 on each count, the fines to be cumulated. The corporate defendant was fined $5,000.00 on each count, to be cumulated. The judgments against all defendants were stayed pending this appeal.

The Government Case

Paterno and Sons, Inc. was in the business of sewerage construction and installation, involving, among other things, the excavation and transportation of large masses of earth, and necessitating the hiring of a great many independent truckers (1210a*-1212a). The Government's allegations with respect to all counts against all appellants arose out of the Government's contention that 48 corporate checks made out during the period in question to five payees—Michael Catenzaro, Thomas Tuccella, John Aurrichio, Arthur Lazravitch, and Anthony Ferrotta—which were deducted as expenses for equipment rentals and equipment repairs in connection with the corporation's trucking expenses on the corporation's income tax returns, were not in fact paid for payment of trucking expenses. The Government claimed that the deductions

* The letter "a" preceded by a number designates page reference to the Joint Appendix.

were known to the defendants to have been false, as the trucking expenses represented by the 48 checks were allegedly never in fact incurred.

To support its allegation that these deductions were fictitious and were never made for legitimate trucking expenditures, the Government's evidence, considered as it must be on appeal in the light most favorable to the Government, tended to establish the following.

Internal Revenue Agent Rizzo testified that during the period December 1970 through April 1971 he was assigned to conduct an income tax examination of Paterno & Sons, Inc. During the course of his examination, he observed that corporate checks made out to several payees had apparently been cashed rather than deposited. On checking further he ascertained that there were 48 of these checks over the period reflected in the indictment which had, according to the corporation's records, been paid for trucking expenses to five payees (198a, 202a-206a).

Rizzo testified that on April 30, 1971, while on the premises of the corporation, he asked appellant Denti, who was a "nominal officer"—treasurer of the corporation but owning no corporate stock—for copies of the checks to and invoices of the five payees, "and then I asked him for a list, a current list, of all these truckers, five truckers." (207a, 316a, 675a). Rizzo told Denti that Rizzo's purpose in requesting the list was to verify whether the payees who had cashed the checks had reported the income on their own respective income tax returns (207a).

After making his request, Rizzo went elsewhere on the corporate premises. Half an hour later, Rizzo again met with Denti, and Denti handed him copies of the checks and invoices which Rizzo had requested, along with a list containing names and addresses of three of the five payees

of the questioned checks. When Rizzo pointed out that only three of the five names appeared on the list, Denti said, "I will get you the two—the two, at a later date." (207a-208a). Rizzo checked the information on the invoices and lists and discovered that these addresses were non-existent. Within a month, a special agent (Mr. Ayres) was assigned to the case (255a).

At trial, the Government introduced into evidence the 48 checks, each of which was made payable to one of the five allegedly fictitious truckers, and 47 invoices purportedly submitted by the five disputed truckers for services purportedly performed by them for Paterno & Sons, Inc. at any one of five different construction sites (Exhibits 1-48, Exhibits 1A-47A). The corporation's income tax returns were prepared by a certified public accountant from the books and records of the corporation, which treated the 48 checks as expenses for the corporation's equipment rentals and repairs (140a-145a, 196a, 219a). The invoices bore the names, addresses, and telephone numbers for these disputed truckers.

The Government called as witnesses representatives of the Internal Revenue Service and the New York State Department of Taxation, who testified that no income tax returns for the years in question had been filed by anyone with the name of any of the five disputed truckers,* and letter carriers who testified that the addresses on the invoices were either not subscribed to by anyone during the years in question, or were subscribed to by someone other than the five named truckers. It was also estab-

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* In fact, returns were filed for one of the five names—John Aurrichio—but the "John Aurrichio" who filed those returns had not performed services for Paterno & Sons, Inc. during the years at issue. (525a, et seq., 784a).

lished that no truckers with the names of the five payees were covered by workmen's compensation insurance in New York State, and that no trucker* with any of the five names was a member of the union for drivers of heavy equipment covering New York City, Nassau, and Suffolk, which were the locations of the areas reflected on the invoices. A representative of the New York State Department of Motor Vehicles testified that none of the five named truckers had an operator's or chauffeur's license for the period 1969-1972 (109a, 607a, 609a, 740a, 784a, 823a).

The Government established that 39 of these 48 checks were cashed at the Royal National Bank, where the corporation maintained its account, through the testimony of employees of the Royal National Bank** who had either approved the cashing of or had cashed each of the 39 checks. Cashing of checks, which was "a normal accommodation" of the bank, would be done after a bank officer had spoken with and received permission by telephone from "someone in the office" of the corporation (361a, 440a, 560a). With respect to some of the checks, the oral approval was given by Denti, who would call a bank official and say a "check was being sent over to the bank payble to so and so for X number of dollars and to cash it." (350a, 400a-402a)

The checks would physically be brought to the bank by, and the cash would be given to, men who "were attired in working clothes" (349a, 399a-400a). The Government itself elicited through the testimony of several of its bank employee witnesses that after they had received grand

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* Again, with the exception of John Aurrichio—see preceding footnote.

** Hoffman, Andretta, Colantino, Weisenberg, and Muscatello.

jury subpoenas, Paterno and Denti had told them that "these checks represented checks payable to truckers who had performed work for them." (405a-406a, 358a)

The remaining nine of the 48 checks were cashed at a bar and grill that regularly cashed checks for both customers and non-customers as an accommodation. The owner who had cashed the checks did not know any individuals whose names were the names that appeared on the nine checks he cashed, and had never met either Denti or Paterno (549a-606a).

The Government also called as witnesses the owners of several trucking companies that had performed trucking services for Paterno & Sons, Inc. at the construction sites reflected on the invoices of the five allegedly fictitious truckers.* They had been hired by the corporation to haul large amounts of dirt from or to the various excavation job sites. None of them was able to recall ever having heard the names of the five allegedly fictitious truckers as names of employees they had hired to drive their trucks or whom they had met at the job sites (468a-469a, 521a, 545a-546a, 628a-630a), including the owner of one company which, Denti had said during a question and answer session with the Internal Revenue Service agents, had "probably" hired one of the five disputed truckers. Denti had also told the agents, when asked if he "knew" the five designated truckers, that he did not "know" them on a personal basis (628a-630a, 1143a-1148a, 1652a).

The truck owners also testified that they had no idea of the number of trucks that had worked at the various job-sites; that rules requiring union help to be employed at the sites were regularly disregarded and circumvented; and that it was common practice for truckers hired by

* Messrs. Capossela, Cimino, LaSpina, and Minichino.

Paterno & Sons, Inc. to hire in turn other truckmen whose names the intermediaries could not recall and who would bill Paterno & Sons, Inc. directly. As the superintendent testified, "I didn't have a list of truckers. You know, there's a thousand truckers." (494a, 523a-524a, 554a, 624a, 634a, 643a, 1232a, 1285a-1286a, 1304a).

The Government also called as witnesses two engineers (Messrs. Clausen and Nebesny) who had served as inspectors at two job sites and kept daily logs of work performed at those sites; their logs reflected that on several of the days on which the corporation was billed per the disputed invoices, no work had been done on the job sites specified on the invoices (1151a-1153a, 1158a-1163a, 1369a-1372a, 1376a-1380a). Reports of one of these engineers for two months reflected the same number of trucks used on one of the sites as had been reflected on reports for those two months filed by the corporation (1378a-1379a).

The Government proved the corporation's method of paying truckers through the testimony of several of the corporation's employees: James O'Reilly, who, as a construction supervisor for the corporation during the years at issue, was in charge of overseeing certain particular jobs on-site of the corporation; Louise Ferraro, who was the corporation's bookkeeper from 1966-1968, and her sister, Ann Altro, who replaced Miss Ferraro as bookkeeper from 1968-1970 (670a, 1076a, 1208a-1209a, 1217a-1219a). Appellant Paterno, who was the corporation's president, and Thomas Cohill, the corporation's vice-president, had authority to sign all corporate checks. Appellant Denti was authorized to sign only payroll checks. Bills were paid by the bookkeeper preparing checks for signature by an authorized corporate officer (675a, 702a-704a).

O'Reilly testified that a truck driver, at the end of a day, would present two copies of a receipt to one of the

men in charge at a particular job-site. One of these copies of each receipt would be kept by either the foreman or the superintendent or whomever else was given the receipt by the driver, and the other copy would be signed and handed back to the truck driver as his proof that he had worked that day. However, "sometimes the laborers keep them [i.e., both copies of the delivery receipt] in their pockets and you just don't get them." The receipts which were obtained from the drivers would then be attached to a daily report of the supervisor, which report listed the number of men who worked on each day, and a general description of the type of work that was done that day. This report, with the receipts, would either be mailed or taken back to the corporation's offices (1213a-1217a).

Subsequently, the bookkeepers testified, invoices would be received from truckers. They would be dated when received, and then the bookkeeper would take from her files the cost sheets and receipts which had previously been submitted from the job-site. Miss Altro testified that she always either had a receipt for every invoice that was received, or was able to obtain a receipt by calling up the trucker who had submitted the invoice. The invoices were then entered in the purchase journal, after which they were filed alphabetically in an accordian-type file (677a-680a).

Miss Ferraro, the first bookkeeper, testified that at the end of each month she would make out an accounts payable list, consisting of all expenses incurred by the corporation, including trucking expenses, and would show the list to Paterno, who would mark on the list those items which were to be paid (1091a-1093a). The second bookkeeper, Miss Altro, testified that she did not remember whether she had prepared any such monthly list

of expenses, and that she never prepared checks for payment without having a delivery ticket attached to the invoice. The Government, which had called her as a witness, attempted to impeach her credibility in this latter respect by confronting her with a prior statement she had made to the special agent and whose contents she had adopted as true before the grand jury, in which Miss Altro had said that on occasions Denti would instruct her to prepare checks without delivery receipts, saying that he would explain the lack of substantiation to Paterno. At trial, she repeatedly insisted that on no occasion had she prepared a check for payment of a trucker's invoice without having a delivery receipt (680a-693a). One of the 47 invoices of the five disputed truckers was initialed as "O.K." by Denti (705a-706a). The receipts would be discarded after the invoices were paid, and only the invoices and cancelled checks were retained (1106a, 1120a).

Miss Altro testified that checks payable to truckers were sometimes mailed and were sometimes picked up at the corporation's office. She couldn't recall ever mailing checks to any of the five disputed truckers. O'Reilly testified that he recognized two of the five names (712a-713a, 1225a-1230a). A secretary who did typing work for the corporation and kept phone numbers of suppliers and truckers for the corporation, and who was sometimes requested to call truckers for a particular job, did not remember any truckers with the names of the five payees (1023a-1025a).

The Government also introduced handwriting testimony of an "expert" witness, William Oberg of the Federal Bureau of Investigation (830a et seq.). He testified that, based upon four sheets of paper, each of which had been represented to him by the Government as being a sample of Denti's handwriting, he had concluded that Denti had

endorsed the payee's name on the back of each of five of the 48 disputed checks. One of these purported exemplars upon which Oberg relied was the three-name list that Denti had handed to Revenue Agent Rizzo at the beginning of Rizzo's examination of the corporate records, which was never established as having been written by Denti. The question of the admissibility of this testimony is discussed *infra,* Point I. Oberg also testified that in his opinion six invoices from two different truckers had been typed on the same typewriter (851a-852a).

The Government also called a computation expert to testify to the amount of the corporation's tax liability if the expenses attributable to the five disputed truckers had not been deducted on the corporation's returns (1417a et seq.).

The Defense Case

It was the appellants' contention that the moneys paid to the five allegedly fictitious truckers, taken as deductions on the corporation's income tax returns, were in fact paid for trucking services necessarily and actually incurred by the corporation, whether or not the actual names of the truckers who performed the services were the names that appeared on their invoices and on the checks paid to them. Moreover, the individual appellants contended that even if these checks were not issued for trucking expenses, the Government failed to prove that they had knowledge of this alleged fact.

The preliminary groundwork for their defense was first established through cross-examination of various Government witnesses. They established that it was common practice in the trucking business for one trucker to hire another or to rent his truck to someone else; that

some truckers owned trucks which did not bear their names; that the rules requiring union membership or workmen's compensation payments for trucking done at construction sites were easily and frequently breached; that truckers would often be hired by the day, and that frequently dump trucks and excavation trucks were obtained on a daily basis at the job-sites by whomever might be in charge on a given day (523a-524a, 535a-538a, 554a, 612a, 808a, 1112a, 1213a, 1304a, 1415a).

It was also established through the Government's witnesses that workers other than the five disputed truckers had their checks cashed at the Royal National Bank (205a). The Government's witness, James O'Reilly, a superintendent at various of the corporation's job-sites, testified that he would sometimes request someone else to endorse O'Reilly's signature to O'Reilly's checks so that O'Reilly could obtain cash rather than a check (1245a-1246a). Moreover, several bank employees testified that with respect to the cashed checks payable to the five disputed truckers, those checks would be brought to the bank by, and the cash would be given to, men who appeared to the bank officials to be truckers (349a, 399a-340a). There was no testimony that appellant Denti (or appellant Paterno) brought any of the checks to be cashed at the bank, or received any of the moneys. In fact, the prosecutor conceded, in both his opening and closing statements to the jury,

> "The Government will not prove what happened to this money. The Government does not know what happened to this money, it will not produce any witnesses to tell you what happened to this money." (95a; 1827).

Moreover, the appellants attempted to establish that in order for the work which the corporation performed on

the job-sites specified on the disputed truckers' invoices to have been performed, it was physically impossible to have been done without incurring the trucking expenses represented by the 48 checks to the five disputed truckers. (The jobs which were undertaken by the corporation were completed as required by the specifications in the corporation's agreements with the various contracting parties (see *e.g.*, 1190a, 1412a)). To establish this, the defendants called as expert witnesses engineers who, it was proffered, would testify to the corporation's necessary cost in trucking the amount of dirt required to be trucked pursuant to three of the five jobs billed for on the invoices bearing the questioned truckers' names. This testimony was to be based on evidence in the record establishing the amount of material required to be trucked, the distance to be covered, and the costs required to truck that amount of material over that much distance. As discussed elsewhere, the defendants were prohibited from presenting this defense (see Point IV *infra*, adopting Point II of the companion brief of appellants Paterno and Paterno & Sons, In .).

Appellant Denti also presented testimony of six character witnesses who testified to his reputation in the community for the character traits of honesty and integrity (446a, 1483a, 1592a, 1596a, 1609a, 1645a).

Appellant Denti did not take the stand.

POINT I

The trial Court erred in permitting "expert" handwriting testimony to be introduced against appellant Denti where the Government failed to prove that one of the "exemplars" upon which the "expert" relied in making his handwriting analysis was in fact written by Denti.

The strongest and most direct proof adduced by the Government in support of its essential allegation that appellant Denti knew that the 48 checks in question were not in fact paid to truckers (whatever their names may have been) for trucking services incurred by the corporation was the testimony of a "handwriting expert" called as a witness by the Government, William Oberg of the Federal Bureau of Investigation, who testified that the endorsements of payees' names on the backs of five of the questioned checks were in fact signed by appellant Denti (830a et seq.). The prosecutor argued during his summation the allegedly probative value of the handwriting testimony as tending to prove Denti's guilt (1826a). The Court below, in its instructions to the jury marshaling the evidence upon which all sides relied, also stated:

> "The Government relies on evidence alleged to show that Mr. Denti signed as endorser some of the checks in question." (1901a).

Obviously, if the jury believed that Denti had endorsed five of the questioned checks, they could have drawn the inference that Denti himself had taken the cash, and that the amounts reflected on the checks had been improperly deducted as expenses on the corporation's income tax returns, with Denti's knowledge.

It is respectfully submitted that the Court below erred in permitting Oberg to testify to his conclusion that Denti endorsed payees' names on the five checks, for the reason that the Government failed to establish that one of the purported exemplars of Denti's alleged handwriting upon which Oberg relied in rendering his opinion was in fact the handwriting of appellant Denti.

Revenue Agent Rizzo testified that when he found evidence during the course of his examination of the corporation's records that certain checks payable to the five disputed truckers had been cashed rather than deposited, he asked Denti for copies of the cancelled checks and of the truckers' invoices, and "for a list, a current list of all these truckers, five truckers." (207a). He told Denti that the reason for his request was "to verify the fact that these people picked up the income . . . [on] their respective returns" (207a).

Rizzo's request to Denti was made on the first floor of the corporation's offices. After making the request, Rizzo went upstairs and continued his examination. Half an hour later, back downstairs, Denti gave Rizzo copies of the cancelled checks and of the invoices, and also "he gave me a list which contained only three [of the five] names." The list contained the names of three of the payees and an address for each of the three. When Rizzo asked for the other two, Denti answered, "I will get you the two—the two, at a later date." That night, Rizzo wrote the date on the upper right of the piece of paper that had been handed to him by Denti: "4/30/71". On the bottom of the piece of paper was written:

> "Address Current—
> Given by George Denti and written by George Denti
> R/A Rizzo."

The piece of paper was introduced into evidence without objection as Government Exhibit 149 during the course of Rizzo's direct examination (206a-209a; Ex. 149).

On cross-examination, however, it was established that the notation "written by George Denti" was written by Revenue Agent Rizzo, notwithstanding the fact that Rizzo had not seen Denti write the list nor had Denti or anybody else told Rizzo that he had written out the list. Rizzo testified in this regard as follows:

> "Q. Now, on April 30, 1971, you told us that you asked Mr. Denti to write out the names of three of the persons to whom—who were the payees on some of these checks, namely Tuccella, Catenzaro and Ferrotta and he did that at your request?
>
> A. That is not correct.
>
> Q. What is it?
>
> A. I asked for a list of the truckers and their current addresses.
>
> Q. And did he give it to you?
>
> A. I didn't ask him—if I may interject this—I didn't ask him for in [sic] his own handwriting, I asked him for a list. Yes, sir.
>
> Q. All right. And then did he give you a list?
>
> A. He did.
>
> Q. And was it in his own handwriting?
>
> A. I believe it was. He gave it to me, I requested it from him, yes.
>
> Q. And didn't you then underneath the list which he gave you write 'Given by George Denty [sic] and written by George Denti, R.A. Rizzo.?'
>
> A. That is correct.
>
> Q. And that is Exhibit 149?
>
> A. That is correct.

Q. That is in your handwriting?
A. That is.
Q. And the matter which appears above it is in the handwriting of Mr. Denty [sic]?
A. He gave it to me.
Q. Yes. Did you see him write it?
A. No, sir.
Q. Did he say that he wrote it?
A. No, sir.
Q. Nevertheless you wrote 'and written by George Denti' at the bottom of that page, didn't you?
A. Yes, sir.
Q. Although you didn't know who wrote it?
A. I didn't see him write it, no.
Q. And you didn't know who wrote it?
A. No, sir." (246a-247a)

On re-direct examination, the prosecutor attempted again to establish the writing on Exhibit 149 as being Denti's, without success:

"Q. Now, on April 31, 1971, Mr. Denti gave to you, I believe, Government's Exhibit 149?
A. Yes. Here (indicating).
Q. When he handed you that exhibit did he tell you who prepared that exhibit?
A. No.
Q. Did you see who prepared that exhibit?
A. No." (322a)

Rizzo testified that he subsequently received samples of Denti's handwriting containing the names of the five payees. These samples were contained on three sheets of paper, introduced into evidence without objection as Exhibits 146, 147 and 148 (217a-218a).

Later in the trial, the Government called its "handwriting expert", Mr. Oberg, who testified that he had examined Exhibits 146-149 for the purpose of "determin[ing] whether or not the writer of Government's Exhibits 146-149 had prepared any of the writing on Government Exhibits 1-48" (833a). When the defense objected to the question as to whether Oberg had formed an opinion, the following brief colloquy between the Court and the prosecutor ensued:

> "[The Court:] [W]as there any testimony as to whose handwriting it [Exhibit 149] purports to be?
>
> [Prosecutor:] No, your Honor. This was just a paper that Agent Rizzo had received from Mr. Denti on that occasion." (834a)

Objection was taken by the defense to permitting Oberg to testify to any opinion which would be in part based upon Exhibit 149. The objection was overruled (834a-839a, 842a). Oberg thereafter testified that:

> "My conclusion is that some of the endorsements on Government's Exhibits No. 1 through 48 were prepared by the writer of Government's Exhibits Nos. 146 through 149." (840a)

There were five such checks which Oberg opined as having been endorsed "by the writer of Government's Exhibits Nos. 146 through 149." (840a-842a).

When Oberg was asked by the prosecutor to "explain to the jury the reasons for your conclusions", his testimony clearly established that his conclusion was in substantial part based upon the handwriting contained on Exhibit 149 (842a-848a). In fact, he testified that "I considered the combination of all of these characteristics"

in forming his opinion (905a). Yet there was no expert testimony to adduce that the handwriting contained on Exhibits 146-148 (Denti's undisputed exemplars) was written by the same person as the person who wrote the handwriting contained in Exhibit 149 (the disputed "exemplar"). To the contrary, it was clear that Oberg had simply assumed, based upon representations made to him by the Government before he made his examination, that the same individual who had written Exhibits 146-148 had also written Exhibit 149.

> "Q. [Y]ou were furnished with samples, exemplars of George Denti's handwriting, were you not?
>
> A. I was furnished with samples of writing which they say were George Denti's, yes, sir.
>
> Q. Right. And that's Exhibits what, sir?
>
> A. That was Exhibit No. 146 through 149." (883a)

At the conclusion of the Government's case, counsel for Denti moved to strike Exhibit 149. The trial Court denied the motion on the ground that,

> "[I]t would be permissible for counsel to place before the jury the question whether that exhibit, 149, also contains Mr. Denti's handwriting. You don't need an expert on that, as you know." (1446a)

It is respectfully submitted that the Court erred, and that Oberg should not have been permitted to testify to his opinion that appellant Denti endorsed the five checks, as the Government failed to establish a sufficient basis to support the premise upon which Oberg's opinion was based.

The statutory basis permitting the introduction into evidence of expert handwriting testimony is provided in 28 U.S.C. §1731, which states:

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

In order to establish that the trial Court erred in admitting his "expert" testimony on the grounds that the purported "exemplars" were not sufficiently authenticated, "defendant must show that the ruling was not fairly supported by the evidence." *United States* v. *Swan,* 396 F.2d 883, 885 (2d Cir. 1968) cert. denied 393 U.S. 923. It has elsewhere been held that "Because this is a criminal case such proof [of the authenticity of handwriting exemplars] must be beyond a reasonable doubt." *State* v. *Danahey,* 274 A.2d 736, 108 R.I. 291, 300 (Sup.Ct. of R.I. 1971).

It is respectfully submitted that an analysis of previous judicial decisions defining appropriate criteria for the authentication by circumstantial evidence of handwriting exemplars clearly indicates that the inference permitted by the trial Court—that Exhibit 149 was in fact written by appellant Denti—was not fairly supported by the evidence. In fact, the inference was not supported by any evidence at all, as Rizzo was simply unable to testify that Denti had written the words appearing on Exhibit 149, or that anyone had seen him writing it, or that Denti had admitted writing it or had performed actions which in context would be tantamount to a concession that he had written it, or that any of the circumstances surrounding Rizzo's request for the names and Denti's producing the three-name list indicated in any manner that the list had been written by Denti. To the contrary, it was established that numerous people worked at the corporation's office, including bookkeepers, secretaries, and other per-

sonnel, and there was no evidence indicating that Denti, rather than any of the other people who worked at the office, had written the list.

Numerous decisions by various State Courts of Appeals have held purported "exemplars" to have been insufficiently authenticated, and "expert" testimony based on those "exemplars" to have been inadmissible, under circumstances indistinguishable from the facts in the instant case. In *State* v. *O'Dell*, 46 Wash.2d 206, 279 P.2d 1087 (Sup.Ct. of Wash. *en banc* 1955), a defendant was prosecuted for larceny for presenting to a store a bogus check made payable to him and endorsed with his name. The trial Court permitted the introduction into evidence as an appropriate exemplar of the defendant's handwriting a handwritten note bearing the defendant's name at the bottom. The Supreme Court of Washington, sitting *en banc*, unanimously reversed the conviction on the ground that the authenticity of the purported "exemplar" had not been adequately established.

Similarly, in *Brantley* v. *State*, 84 Fla. 659, 94 So. 678 (Sup.Ct. of Fla. 1922), a defendant was prosecuted for the mailing of an anonymous threatening communication. The prosecution introduced into evidence as a purported "exemplar" of the defendant's handwriting another threatening communication to another individual, this one bearing a signature of the defendant's name. The Supreme Court of Florida unanimously reversed the defendant's conviction on the ground that the prosecution had failed to produce sufficient evidence to warrant the inference that the "exemplar" had in fact been signed by the defendant.

Even in civil cases, "exemplars" of handwriting have been held to be inadequately authenticated under circumstances similar to the instant case. For example, in *Citi-*

zens Bank & Trust Co. v. *Allen,* 43 Fed.2d 549 (4th Cir. 1930), cert. denied 284 U.S. 662 an action on promissory notes, the defendant denied signing the notes. The bank attempted to introduce other notes bearing signatures in the name of this defendant, who also denied signing the other notes. The Court held that the "exemplars" offered into evidence by the bank were properly excluded by the trial Court, as the bank had failed to establish their authenticity.

In *Rauenzahn* v. *Sigman,* 383 Pa. 439, 119 A.2d 312 (Sup.Ct. of Pa. 1956), an action to recover assets of an estate by an alleged donee of a gift, plaintiff attempted to introduce into evidence a document allegedly signed by the donor. To authenticate the donor's signature, the plaintiff attempted to introduce as exemplars four checks purportedly endorsed by the alleged donor, all of which had been honored and paid by the bank upon which the checks were drawn. The Supreme Court of Pennsylvania unanimously held that the donor's signature on the "exemplars" had not been sufficiently authenticated.

In *Fredericksen* v. *Fullmer,* 74 Id. 164, 258 P.2d 1155 (Sup.Ct. of Id. 1953), an action for specific enforcement of a contract against the administratrix of an estate, plaintiff attempted to prove the decedent's signature on the contract in question by introducing into evidence a "relief warrant" given by the county government to the decedent, which had been endorsed in the decedent's name and cashed. The Supreme Court of Idaho unanimously held that the exemplar should have been excluded, as the decedent's signature had not been adequately authenticated, and that the "exemplar" therefore could not be used as a standard of comparison. Similarly, in *Farrell* v. *Manhattan Ry. Co.,* 83 App.Div. 393, 82 N.Y.S. 334 (1903), aff'd without opinion 178 N.Y. 596, 70 N.E. 1098, an action

to enjoin the defendant from operating an elevated railroad in front of the defendant's premises, the defendant attempted to introduce into evidence a writing purporting to be a consent signed by the previous owner of the plaintiff's property, who was deceased at the time of trial. As an "exemplar" of the decedent's handwriting through which the defendant attempted to support the introduction of the decedent's alleged written consent, the defendant offered into evidence the decedent's contract for the purchase of those very premises, which had been found by the decedent's son among the decedent's papers after the decedent's death. The Appellate Court upheld the trial Court's exclusion of the defendant's proffered testimony by a handwriting "expert" on the grounds that the authenticity of the "exemplar" had not been adequately established. Cf. *Simonson* v. *Typer,* 285 Fed. 240 (8th Cir. 1922).

It is not the contention of appellant Denti that authenticity of handwriting exemplars must be proved by direct rather than circumstantial evidence; rather, it is respectfully submitted that the Government failed in this case to present circumstantial evidence sufficiently probative to permit the inference that Denti wrote Exhibit 149. The factual circumstances of the cases holding that sufficient circumstantial evidence authenticating handwriting exemplars had been proved, most notably cases decided by this Court, indicate the extent of the Government's burden in establishing that what the Government claims to be a sample of the defendant's handwriting was in fact written by the defendant.

In *United States* v. *Swan, supra,* a mail fraud prosecution, the Government attempted to prove that the mail order forms in question were filled out by the defendant. As exemplars, the Government introduced into evidence

the defendant's application to the Columbia University Graduate School of Business, and other forms submitted to the school while the defendant was a student and which were held by the school in its regular course of business. The Court held these to be exemplars adequately authenticated by the Government, for the reasons that the signatures on the form were admittedly signed by the defendant, a co-defendant had testified that the writing on the records was "similiar" to the defendant's other writings which the co-defendant had seen, and the assistant registrar at the school had testified that "it is customary for students to fill out their own registration cards." 396 F.2d at 885.

In *United States* v. *Liguori,* 373 F.2d 304 (2d Cir. 1967), a prosecution for mailing of narcotics, the Government, to establish that a note found in the package containing the narcotics had been written by the defendant, introduced into evidence as the defendant's handwriting exemplars what was undisputably the defendant's own lease application, key application, auto registration, and chauffeur's application. Under these circumstances, this Court held that "only baseless speculation could assign these documents to any hand other than that of appellant". 373 F.2d at 306. Moreover, in *Liguori,* the expert witness testified that all of the documents, including the note, were written by the same person. In the instant case, there was no such testimony. Oberg's testimony that the five endorsements were written by the same person who wrote Exhibits 146-149 was based upon the assumption that each of Exhibits 146-149 was written by the same person, and his testimony identifying that "person" as the same person who wrote the endorsements was based on a combination of similar characteristics between Exhibits 146-149 and the endorsements on the five checks.

However, Oberg did not testify that Exhibits 146-148 were written by the same person as the person who wrote 149.

In *United States* v. *Reed*, 439 F.2d 1 (2d Cir. 1971), a bank robbery prosecution, the Government introduced into evidence registration cards filled out at two motels under the name "Casey". The Government attempted to establish that the cards had been filled out by the defendant, in order to corroborate a cooperating co-conspirator's testimony that the defendant and others had registered at the two motels on the evenings in question. As "exemplars" of the defendant's handwriting, the Government introduced into evidence registration cards at a different hotel filled out with a similar name, specifying the same purported employment by the same distinctively named business, which were introduced through a hotel manager who was a former policeman who had once arrested the defendant and who testified that the man who registered under the name "Casey" was either the defendant or the defendant's brother, and a W-4 withholding tax form which appellant had signed in 1968. This Court held that sufficient evidence had been adduced to permit the inference that the exemplars of the registration forms at the other hotel had been filled out by the defendant, through the testimony of the co-conspirator, the similarity of contents of the registration forms, including the names and places of employment, and the testimony of the former police officer. Again, no such testimony was elicited by the Government in the instant case.

In *United States* v. *Garelle*, 438 F.2d 336 (2d Cir. 1970), cert. denied 401 U.S. 967, a prosecution for narcotics importation, the Government introduced into evidence two letters purportedly written by the appellant Zimmerman. As exemplars, the Government introduced into evidence a letter that had been taken from Zimmer-

man with the partial signature at the bottom "Martin Zi * * *" along with Zimmerman's repatriation file establishing that the contents of the letter corresponded with facts about his recent life. The Court held that this was sufficient to establish the authenticity of the exemplars. Other courts have similarly held that official Government records purporting to contain a defendant's signature may be introduced as exemplars of the defendant's handwriting. See, e.g., *Shelton* v. *United States*, 205 F.2d 806 (5th Cir. 1953); *Reining* v. *United States*, 167 F.2d 362 (5th Cir. 1948), cert. denied 335 U.S. 830. The instant case is, of course, entirely different from that situation: in the instant case, rather than an official governmental form which may be presumed to have been signed and filled out by the individual purporting to sign and fill out the form, all that the Government presented was testimony that a nondescript piece of paper containing three names with addresses was handed by Denti to a revenue agent half an hour after the agent had asked for such a list. Rizzo did not see where the list came from, had not asked Denti to write out the list in his own handwriting, and did not see and was not told who had written the list.

In *United States* v. *American Radiator & Stand. San. Corp.*, 433 F.2d 174 (3d Cir. 1970), cert. denied 401 U.S. 948, a Sherman Act prosecution, the Government introduced into evidence six pages of handwritten notes on hotel stationery, which contained the same figures as appeared on another company's price worksheet. The Government claimed that one Pape, an official of Crane, had written all six pages. The Government proved that the six pages were found in Crane's files, were stapled together, and were "internally consistent in content." Pape's secretary identified the handwriting on four of the six pages, and the court held that the jury was therefore entitled to in-

fer that Pape had written the other two pages, applying the standard of *Swan* "that there be sufficient evidence so that a jury finding of genuineness would not be subject to reversal as against the weight of the evidence", 433 F. 2d at 193. The four pages were properly admitted into evidence, the Court held, as exemplars for the other two pages. In that case, there was every reason to believe that whoever had written four of the pages had written the other two, as they were all found in the same files, they were stapled together as one small unit, and they were internally consistent in content. In the instant case, however, there was no such evidence. Exhibit 149 was handed to Rizzo as a solitary sheet of paper. There was absolutely no connection between it and Exhibits 146-148 which Rizzo obtained from Denti months later in a completely unrelated setting.

What the above cases clearly indicate is that the Government must prove by sufficient circumstantial evidence that a purported "exemplar" of a defendant's handwriting was in fact written by a defendant, or that the papers which the Government claims to be exemplars are of such a nature as to indicate that the writing on the "exemplar" was in fact written by the individual whom the document indicates made the writing. But the only link between Denti and the writing on Exhibit 149 is that he gave it to Rizzo in response to Rizzo's request for information, not in response to a request for a handwriting sample. "Mere possession of a writing does not necessarily imply authorship." *Dean* v. *United States,* 246 Fed. 568, 576 (5th Cir. 1917). In *Dean,* a prosecution for altering a money order, the Court held that a personal memorandum book taken by the arresting officer from the defendant could properly be considered as an exemplar of the defendant's handwriting. The reason for this, the

court said, was, because of the personal nature of the book, it could reasonably be assumed to have been written by the possessor. In the instant case, to the contrary, there was nothing personal about Exhibit 149, and nothing about the nature of the exhibit or its production to Agent Rizzo that indicated it had been written by Denti.

In short, Exhibit 149 was offered into evidence by the Government on the prosecutor's apparent belief that Rizzo had personal knowledge that Denti had written it, and had apparently been submitted to Oberg for use as an exemplar on the same mistaken belief. The handwriting examination by Oberg proceeded on the same assumption, which at trial was finally disclosed to have been completely baseless. Under these circumstances, it is respectfully submitted that Exhibit 149 should have been stricken from the record and should not have been used as an "exemplar" of appellant Denti's handwriting, and the handwriting "expert" should not have been permitted to testify as to his opinion, which was in material part based upon Exhibit 149. Oberg's testimony was highly prejudicial. Its admission deprived Denti of a fair trial and warrants a reversal of his conviction.

POINT II

The trial Court erred in permitting the prosecutor to elicit testimony before the jury that appellant Denti had declined to furnish handwriting exemplars to the revenue agent and special agent until he had an opportunity to consult with counsel to ascertain his rights.

It is respectfully submitted that the Court below erred in permitting the prosecutor to adduce testimony that appellant Denti, after a special agent of the Internal Reve-

nue Service had entered the investigation, declined to furnish handwriting exemplars until he had first consulted with his attorney to learn of his legal rights.

Revenue Agent Rizzo testified on direct examination that he obtained Denti's handwriting exemplars (Exhibits 146-148) on October 18, 1971 (216a-218a). On re-direct examination the prosecutor asked Rizzo whether, on a previous occasion when Rizzo had asked Denti for handwriting exemplars, Denti had complied. Counsel for Denti objected, but the Court overruled the objection. Rizzo then testified that on a previous occasion Rizzo had requested exemplars from Denti, and Denti had begun writing out the names of the five questioned payees, but that Denti had then stopped and "ripped it up." (322a-324a).

On re-cross examination of Rizzo, it was established that Rizzo had made the request of Denti when Rizzo was with the special agent who had been assigned to the case (Mr. Ayres), at the office of Paterno & Sons, Inc. After beginning to write the names as requested, Denti had stopped and said, "Gee, I will have to check with the lawyer." (331a-336a).

One month later, on October 18, 1971, Rizzo received handwriting exemplars from Denti as requested (339a).

In *Griffin* v. *California,* 380 U.S. 609, 615 (1965), the Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." It is respectfully submitted that the prosecutor, in eliciting testimony in the jury's presence of Denti having declined to furnish to the special agent handwriting exemplars before consulting with counsel, violated the principle established in *Griffin.* The clear inference left for the jury was that Denti believed he had something

to hide. Indeed, the prosecutor elsewhere improperly elicited testimony that one of the corporation's bookkeepers had refused to answer questions before the grand jury based upon her "constitutional privilege" (671a).

Appellant Denti recognizes that if he had refused to obey a lawful Court order, his refusal could properly have been brought to the jury's attention. *United States* v. *Doe,* 405 F.2d 436 (2d Cir. 1968.) But this Court's decision in *Doe* held that the Government can argue at trial "on the strong inference to be drawn from continued refusal by [a witness] to furnish exemplars *after judicial determination that he is bound to do so.*" 405 F.2d at 438-439 (emphasis added). Similarly, in *United States* v. *Nix,* 465 F.2d 90 (5th Cir. 1972), cert. denied 409 U.S. 1013, where a conviction was affirmed notwithstanding the prosecutor's comment to a jury concerning a defendant's refusal to submit handwriting exemplars, the court emphasized that the defendant's refusal had followed two separate orders of the District Court specifically directing him to provide the exemplars. See also *People* v. *Hess,* 10 Cal.App.3d 1071, 90 Cal.Rptr. 268 (Court of Appeals, 4th District 1970).

In the instant case, to the contrary, appellant Denti never refused to obey any judicial order, nor was the revenue agent or special agent empowered to direct him to furnish an exemplar. Indeed, Agent Rizzo testified that Denti had been advised of his *Miranda* rights by the special agent (335a), which certainly might have indicated to Denti that he had a legitimate right to refuse to provide the exemplars. When the agents requested that Denti furnish them with an exemplar of his handwriting, Denti merely responded that he first wanted to seek his counsel's advice before furnishing them. Surely, he had every right to inquire from counsel as to what his rights were;

and once he was informed that the law required him to furnish exemplars,* he gave them to the agents without even requiring any judicial direction to do so. There was simply no defiance of any judicial order in this case as there had been in *Doe, Nix,* and *Hess,* and no assertion by the defendant of a non-existent right. Nor did Denti attempt to distort his handwriting on the specimen or to render comparison of the exemplar with the questioned documents difficult or impossible (Compare *United States* v. *Izzi,* 427 F.2d 293 (2d Cir. 1970), cert. denied 399 U.S. 928; *United States* v. *Stembridge,* 477 F.2d 874 (5th Cir. 1973)); rather, he merely inquired from his attorney as to whether or not he was legally required to give exemplars and, having been advised of his legal obligations, he fulfilled them completely. Under these circumstances the prosecutor's eliciting testimony that Denti had "ripped up" his partial exemplar and had insisted on first seeking legal advice to learn of his rights was clearly prejudicial and reversible error.

Indeed, the impropriety of the prosecution deriving the benefits of any such adverse inference has been declared even with respect to grand jury proceedings. In *United States* v. *Doe,* 321 F.Supp. 10 (S.D.NY. 1970), a witness before a grand jury who was a target of the grand jury's investigation declined to furnish requested handwriting exemplars, although directed to do so by the Assistant United States Attorney and the grand jury foreman. Judge Cooper ordered the witness to appear before the grand jury and to furnish exemplars as requested, but specifically stated in his opinion:

> "We will make it our purpose to tell the grand jury that in their search for the truth, they should not

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* See *Gilbert* v. *California,* 388 U.S. 263 (1967); *U.S.* v. *Dionisio,* 410 U.S. 1 (1973).

> draw unfavorable inference against the witness by reason of his refusal heretofore to comply; that he has raised an important constitutional question with respect to which he has every right to obtain judicial resolution." 321 F.Supp. at 13.

Surely, if a defendant has a right to have his rights defined by a formal judicial order without any adverse inference being drawn, then *a fortiori* he has a right to have his rights defined by his own lawyer without any adverse inference being drawn.

A similar situation arose in *United States ex rel. Macon* v. *Yeager,* 476 F.2d 613 (3d Cir. 1973), where the Circuit Court unanimously overturned a manslaughter conviction because of the prosecutor's comment to the jury on the defendant's decision to consult with counsel the day after the decedent's death, a comment which "would appear to have been directed to, and may have had the effect of, raising in the jurors' minds the inference that petitioner was, or at least believed himself to be, guilty." 476 F.2d at 616. Just as the defendant in *Macon* v. *Yeager* had the right to consult with counsel, so too did defendant Denti have the right to consult with counsel before providing exemplars, and just as the prosecutor's attempt to infer guilt or consciousness of guilt from the appellant's exercise of his right to consult counsel was held to be improper and reversible error in *Macon,* so too was it improper and reversible error in the instant case.

A similar adverse inference which the Government attempted improperly to bring to the jury's attention resulted in the unanimous reversal of an income tax prosecution in *United States* v. *Foster,* 309 F.2d 8 (4th Cir. 1962). There, a taxpayer's bank received an Internal Revenue Service summons to produce its books and records concerning the taxpayer. At the taxpayer's direction,

the bank refused production, whereupon the IRS attempted to enforce the summons against the bank by bringing a proceeding in the United States District Court pursuant to 26 U.S.C. §2604. The taxpayer intervened in the litigation, and the District Court held for the Government and ordered the bank to comply with the summons; an appeal was taken, and the judgment below was affirmed; a petition for a writ of certiorari was then filed, but denied, before the records were finally released. At the taxpayer's trial for tax evasion, the Government introduced evidence of the litigation in which appellant had attempted to prevent the IRS from gaining access to the bank records. The conviction was reversed on the ground that

> "this evidence was incompetent and should not have been received. . . . We . . . hold that lawful resistance to investigation does not generate an inference of guilt." 309 F.2d at 14.

The Court emphasized that there was no evidence of the taxpayer's bad faith in taking legal recourse to attempt to prevent the bank's compliance with the summons. Similarly, there was no proof adduced by the Government in the instant case that Denti's seeking legal advice of his rights with respect to a request for handwriting exemplars was undertaken in bad faith. As the Court in *Foster* noted:

> "Throughout it must be remembered, as the appellant stresses, that all of these events took place after the inception of the criminal investigation. Foster's tax problems had been placed in the hands of a Special Agent of the Intelligence Division. Assignment of a case to a Special Agent is generally known to mean that investigation is afoot for a criminal prosecution." 309 F.2d at 13.

If Denti had refused to supply an exemplar after consulting counsel, if he had then been specifically directed by a Court to furnish exemplars, and if he had then disobeyed that lawful order, the prosecutor would have been justified in bringing his refusal to the jury's attention, pursuant to the authorities cited above. However, such was simply not the case here. The agents had no authority to direct him to furnish an exemplar,* and the prosecutor's adducing evidence of his refusal to comply until obtaining legal advice was highly improper. Indeed, having been advised by the special agent of his *Miranda* rights, it was most reasonable for a layman such as Denti to believe that those rights included the right not to give handwriting exemplars, and his decision to consult counsel for a definition of his rights was entirely reasonable under the circumstances. It is respectfully submitted that the prosecutor's eliciting testimony of Denti's legitimate decision not to furnish exemplars until consulting counsel was highly prejudicial error requiring reversal of his conviction.

POINT III

The indictment should have been dismissed because the Government deprived appellants of their right to an administrative conference within the Internal Revenue Service as guaranteed to appellants by published regulations of the Internal Revenue Service.

All appellants filed a joint pre-trial motion for dismissal of the indictment on the ground that they were not afforded administrative conferences provided for in the

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* See *United States* v. *White*, 355 F.2d 909, 912 (7th Cir. 1966).

published regulations of the Internal Revenue Service, in the Internal Revenue Service Manuals, and in the Internal Revenue Service's established procedures as prerequisites for indictment for criminal tax offenses (18a et seq.). The Government did not deny that the appellants were not granted any administrative conference, asserting instead that "there is no obligation to hold a conference at any level" (39a). The trial Court denied appellants' motion, without opinion. It is respectfully submitted the trial Court was in error for the following reasons.

Prosecution of criminal tax offenses differs from prosecution of other federal criminal offenses in the significant respect that the Secretary of the Treasury and the Attorney General are empowered to exercise discretion in favor of compromising "civil or criminal" tax cases, pursuant to the provisions of 26 U.S.C. §7122(a), which states:

> "The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense."

There are four levels of administrative review which may be made available to a prospective defendant and which have been established by specific published regulations or traditional procedures.

Published regulations of the Internal Revenue Service provide for conferences in the Internal Revenue Service at the first two levels of administrative review of recommended criminal tax prosecutions. Section 601.107(b)(2) of the Internal Revenue Practice General Procedural

Rules, promulgated in 1968 and in effect at the time of the investigation of appellants, provided:

> "Every person who may be the subject of a recommendation for prosecution shall be given an opportunity to explain his participation in the alleged criminal violation prior to the submission of the case to Regional Counsel, unless compelling reasons exist to the contrary. At this interview the principal will be informed, by a general oral statement of the alleged fraudulent features of the case, to an extent consistent with protecting the Government's interests and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the nature, basis and other essential elements of the proposed criminal charge against him."

The language of this Rule is clearly mandatory: the prospective defendant "*shall* be given the opportunity to explain his participation," and "*will* be informed . . . of the alleged fraudulent features of the case." The sole exceptions to the compulsory language of the Rule are those cases where "compelling reasons exist to the contrary." There was no such claim (and, of course, no showing) made by the Government of any such "compelling reasons" in the instant case.

The compulsory language of this Section is highlighted by a revision of the Rule effective April 12, 1973 (the indictment against appellants was filed on May 3, 1973, and presumably had been referred to the United States Attorney for prosecution previous to April 12, 1973; appellants' alternative application for a hearing on their motion, at which these facts would have been ascertained,

was also denied by the District Court, without opinion; the special agent entered the case in May, 1971 (255a)). The new provision changed the Rule governing administrative conferences in Intelligence to the following:

> "A taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one or where the Chief, Intelligence Division, makes a determination that such a conference will be in the best interests of the Government. At the conference, the IRS representative will inform the taxpayer by a general oral statement of the alleged fraudulent features of the case, to the extent consistent with protecting the Government's interests, and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the basis, nature, and other essential elements of the proposed criminal charges against him." §601.107(b)(2), Internal Revenue Practice General Procedure Rules, amended April 12, 1973.

Thus, a prospective defendant may now receive a District Intelligence conference only where he requests one and where the Chief of the Intelligence Division determines that such a conference "will be in the best interests of the Government." Under the Internal Revenue Service Rule applicable to the instant case, however, no such request by a prospective defendant was necessary, and the Chief of Intelligence did not have this wide freedom of choice as to whether or not to grant a conference. Rather, as noted above, the published rule promulgated by the Internal Revenue Service entitled prospective defendants to a conference in Intelligence.

The absolute right of a prospective defendant to an administrative conference in Intelligence is further highlighted by the discretionary nature of the conference provisions at the next stage of review in the Internal Revenue Service, at the level of Assistant Regional Commissioner, Intelligence, where a prospective defendant's case is forwarded if the Intelligence Division recommends criminal prosecution.

> "The Assistant Regional Commissioner (Intelligence) *may* grant a conference to the subject of a criminal tax investigation referred to his office." §601.107(c)(1), Internal Revenue Practice General Procedure Rules. (Emphasis added)

The permissive language of this provision—the Assistant Regional Commissioner "may" grant a conference to a prospective defendant—also stands in sharp contrast to the absolute nature of a prospective defendant's right to a conference in Intelligence, as provided in the regulation applicable to appellants' case.

If the Assistant Regional Commissioner (Intelligence) concurs in the recommendation of the Special Agent for criminal prosecution, he forwards the case to Regional Counsel, Criminal Tax Section, of the Internal Revenue Service. General Statement of Procedural Rules, §601.107 (c)(2). The Rule provides that when the case is transferred to Regional Counsel, the Regional Commissioner "shall ordinarily notify the subject of an investigation and his authorized representative." No such notification was made in the instant case.

At Regional Counsel, which is the last level of administrative review within the Internal Revenue Service, a hearing is generally provided. See §401.4 of the Regional Counsel Enforcement Division Manual, which provides:

> "It is the practice of the Chief Counsel's Office to offer a conference opportunity to each prospective defendant in a criminal tax case. Conferences are generally granted, if requested, or if Regional Counsel concludes that such a conference would serve a useful purpose."

If Regional Counsel concurs in the recommendation for criminal prosecution, the case is transmitted to the Criminal Section of the Tax Division of the Department of Justice in Washington, D. C. Although no published rules govern a prospective defendant's right, if any, to a conference at Justice, a prospective defendant is generally "advised by the Revenue Service that the case has been transmitted to the Department of Justice and that the Department will grant [a] conference if requested." *Defending Tax Fraud Prosecutions,* "Administrative Processes After Investigation Is Completed," Richard M. Roberts, Deputy Assistant Attorney General in the Tax Division, U. S. Department of Justice, Practicing Law Institute, 69 (1970). If it is concluded that criminal prosecution is warranted, the case is then forwarded to a United States Attorney's Office for presentation to a grand jury.

Thus, an elaborate administrative framework has been established, through published rules and unpublished general practice, for thorough administrative review of prospective criminal cases before an indictment is sought and obtained, and for a prospective defendant's right to participate in at least one such conference (at Intelligence) and his right to be kept informed as the case is transmitted to various other levels, presumably so that he may take whatever steps he and his counsel deem appropriate to ward off criminal prosecution. As the Assistant Commissioner of the Internal Revenue Service has stated,

> "Throughout the [administrative] review process, the taxpayer's counsel, if he so desires, may take advantage of the opportunity to avail himself of conferences at each level to press factual and legal arguments in the interests of his client." Bacon, 34 Journal of Taxation 198, 201.

In the instant case, no such opportunity was given to the appellants, nor did the IRS comply with the regulations prescribing the necessary steps that must be taken before any prosecution such as this could be had. Whether the Justice Department bypassed the IRS in securing the instant prosecution or such criminal prosecution was a joint effort, the fact is that the Government short-cut its own established and published procedures set forth in the regulations and deprived the appellant of a legal right to administrative review to which he was entitled.

The principle that the dictates of due process require a governmental agency to abide by its own published regulations has been most recently enforced in the area of pre-indictment statements by a defendant in a criminal tax prosecution to a special agent of the Internal Revenue Service. In a news release issued to its special agents, the Internal Revenue Service instructed those agents that, before interrogation of taxpayers, the special agent must inform each taxpayer of his constitutional rights. Where the agents fail to give that warning, even though the warning is not required under *Miranda* because of its pre-custodial nature, statements made by the taxpayers will be suppressed as evidence in a criminal trial. *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1969); *United States* v. *Leahey,* 434 F.2d 7 (1st Cir. 1971); *United States* v. *Phifer,* 335 F.Supp. 724 (S.D.Tex. 1971). "Due process requires the I.R.S. to follow its announced procedures." *United States* v. *Leahey,* 434 F.2d at 10.

It is significant that the sanction imposed by the courts upon the Government in the above-cited cases resulted from the failure of Government agents to follow a directive that appeared only in an internal news release. In the instant case, the regulations which the Government ignored were publicly published. Thus, they were promulgated with a more substantial imprimatur of law, and their breach by the Government officials in this case should therefore be deemed to have been more egregious.

It is a well-established rule of law that

> "a validly promulgated regulation binds the government as much as the individuals subject to the regulations; and, this is no less so because the governmental action is essentially discretionary in nature . . . . When regulations prescribe specific steps to be taken to insure due process they must be substantially observed." *Friedberg* v. *Resor,* 453 F.2d 935, 937, 938 (2d Cir. 1971).

In *Friedberg,* regulations of the Armed Forces prescribed various rules governing hearings before the Review Board to resolve claims of conscientious objector status. This Court held that because the Review Board had failed to follow the Army's own regulations in processing the application for discharge as a conscientious objector, the denial of the application constituted a denial of military due process.* Cf. *United States ex rel Donham* v. *Resor,* 436 F.2d 751 (2d Cir. 1971).

Numerous other decisions have overturned governmental actions undertaken in violation of the Government's

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* "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'." *Schneider* v. *Rusk,* 377 U.S. 163, 168 (1964).

own prescribed rules and regulations. In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), petitioner attacked the validity of the denial by the Board of Immigration Appeals for suspension of his deportation. "Regulations with the force and effect of law supplement the bare bones of"* the applicable statute, and provided for independent administrative review at three levels below the Attorney General. The Supreme Court held that if petitioner could prove his allegation that the Attorney General's public statement before a final decision by the Appeals Review Board resulted in "the Board's alleged *failure to exercise* its own discretion"**, petitioner would be entitled to a new hearing before the Board. Similarly in the instant case, the published regulations of the Internal Revenue Service bind the Service to exercise its discretion and make its decisions at the various administrative levels only after a prospective defendant has been given an opportunity to participate in the conferences provided by regulations, on at least one administrative level. It is respectfully submitted that the Government's failure to comply with this regulation vitiated the subsequent criminal proceeding. See also *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), directing reinstatement of a discharged Department of Interior employee because the Secretary of the Interior failed to comply with the regulations of his Department governing discharge of employees; *Service* v. *Dulles*, 354 U.S. 363 (1957), holding invalid the dismissal of a State Department employee whose dismissal contravened the State Department's own regulations; *Yellin* v. *United States*, 374 U.S. 109, 120 (1963), reversing the conviction for contempt of a Con-

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* 347 U.S. at 265.

** 347 U.S. at 268; emphasis in original.

gressional Committee because "the Committee failed to exercise its discretion according to the standards which Yellin had a right to have considered", i.e., according to the Committee's own published rules.

The case of *United States* v. *Goldstein*, 342 F.Supp. 661 (E.D.N.Y. 1972), in which Judge Judd rejected a similar contention of defendants indicted under somewhat different circumstances, is respectfully brought to this Court's attention. There, the defendants were not offered a conference at the Special Agents level, but "defendant Goldstein was offered a conference with Regional Counsel, Enforcement, in September, 1971, concerning proposed criminal action against him, but the letter to him was returned undelivered with a post-office notation, 'Moved, Left No Address'." 342 F.Supp. at 663-664. The IRS made no further attempt to communicate with Goldstein. The District Court held the defendants were not entitled to a conference, notwithstanding the apparent mandatory language of the regulation dealing with conferences on the Special Agents' level. The District Court held that this regulation, as well as the other IRS rules regarding administrative conferences, was designed not to confer rights on the taxpayer but to "serve a purpose of efficiency, in avoiding prosecution of cases which may not really merit criminal prosecution." 342 F.Supp. at 665.

It is respectfully submitted that this rationale for the rules' existence defies the unambiguous language of the regulation providing, in mandatory language, for a conference in Intelligence. If "efficiency" for the IRS were the single goal of the regulations, the discretionary language that appears in the rule governing conferences before the Regional Commissioner would have been all that would have been necessary. Moreover, even if the sole purpose of the rule were one of efficiency, that would not

indicate that the mandatory language of the rule does not grant an absolute right to a prospective defendant to have a conference, for by granting such an absolute right to a prospective defendant the same efficiency within IRS could be achieved.

In addition, affidavits were submitted by IRS officials to the District Court in *Goldstein* directly contradicting the Court's indication that the purpose of the rules governing conferences was not to confer a right upon a prospective defendant to present his defense. The Government in *Goldstein* submitted to the Court affidavits from the Assistant Regional Counsel (Enforcement) and a Senior Trial Attorney of the Regional Counsel's office for the North American Region, both of which specifically averred:

> "The purpose of a conference is to give to a taxpayer or his representative the opportunity to offer a defense or explanation."

In support of its holding, the District Court in *Goldstein* relied in considerable measure on a statement in Kostelanetz and Bender, *Criminal Aspects of Tax Fraud Cases* (2d Ed. 1968), stating that the administrative conference on the local Intelligence level, as well as in Enforcement and in the Justice Department, is not a matter of right to a prospective defendant. (See excerpt quoted at length, 342 F.Supp. at 667). However, that book was published prior to the promulgation of Sections 601.107 (b)(2), (c)(1) of the Internal Revenue Practice General Procedural Rules, a fact which was apparently not brought to the District Court's attention.

The District Court in *Goldstein* made no reference to the differences in language contained in the regulation

providing that a conference in Intelligence "shall" be afforded the taxpayer whereas a conference with the Assistant Regional Commissioner of Intelligence "may" be so afforded. The difference between the use of "shall" and "may" in the regulation traditionally signifies an intention that the word "shall" is a mandatory direction and in contrast the word "may" is permissive. Such a meaningful difference was noted by this Court in *United States ex rel. Zapp et al.* v. *District Director of Immigration & Naturalization,* 120 F.2d 762, 765 (1941), as follows:

> "The natural interpretation of the language used, that the alien 'may be released under a bond,' would indicate that the release is discretionary with the Attorney General; and that appears to be borne out by other provisions of this section, as well as other sections of the immigration laws, where the choice of words appears to have significance. This is a long section, where the word 'shall' is used some eleven times, and each time apparently with care. In fact its use in the first sentence of the section is illustrative; here it is stated that the deportations of the aliens 'shall, at the option of the Secretary of Labor [Attorney General], be to the country whence they came' or to the foreign port of embarkation. The language is thus apt to confer a limited discretion as to the destination only, while leaving the command to deport in full force. It does not, as relators claim, show a legislative formula to confer discretion; it does show care and discrimination in the choice of language."

Moreover, a mandatory interpretation of the direction to afford a conference at this early stage in the process of recommending criminal prosecution is consistent with the

policy of the IRS in carefully screening all such situations to avoid unnecessary and unwarranted prosecutions. The salutary effect of these procedures was noted in *Donaldson* v. *United States,* 400 U.S. 517, 535, n. 17, where the Supreme Court refers to the number of investigations that did not culminate in recommendations of criminal prosecution.

Furthermore, the IRS in *Goldstein* in fact did take certain minimal steps aimed at granting one of the defendants a conference, even if it was at the level of Regional Counsel* rather than at Intelligence. Had a conference at Regional Counsel been granted, then the prospective defendant could at least have had the opportunity to have had his defense considered within the administrative framework of the IRS. Unforunately for the defendant to whom the letter affording a conference was sent, the letter never reached him, but this was not through any fault of the IRS. In the instant case, to the contrary, the IRS took absolutely no step toward granting any prospective defendant a conference, and thus precluded themselves from exercising an informed discretion based upon any such conference before recommending criminal prosecution.

The District Court opinion in *Goldstein* also relied for its holding on the assertion that "the right of a grand jury to indict is not limited by regulations concerning the preliminary procedure to be followed,"** citing as authority *Sullivan* v. *United States,* 348 U.S. 170 (1954). In *Sullivan,* the Supreme Court held that where a wholly in-

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* It has been elsewhere held that a conference with Regional Counsel "is a matter of grace" to which a prospective defendant is not necessarily entitled by the regulations. See *United States* v. *Campanella,* 32 AFTR 73-6177 (9th Cir. 1973).

** 342 F.Supp. at 668.

ternal circular letter of the Department of Justice directed that all United States Attorneys present criminal tax cases to grand juries only when authorized by the Attorney General's office, and a United States Attorney presented evidence to and obtained an indictment from a grand jury without the authorization provided for in the circular letter, such circumstances were insufficient to warrant dismissal of the indictment. The Supreme Court held that the circular letter "was simply a housekeeping provision of the Department," and as such "it was never promulgated as a regulation of the Department and published in the Federal Register." 348 U.S. at 173.

This rationale underlying *Sullivan* is simply absent in the instant case. The rule granting a prospective defendant a conference in Intelligence is, as noted above, publicly published, and is not merely an internal "housekeeping" provision allocating responsibility within a governmental agency. The significance of this distinction is apparent in *United States* v. *Hutul,* 416 F.2d 607 (7th Cir. 1969), cert. denied 396 U.S. 1007, where as in *Sullivan* a defendant moved for dismissal of an indictment returned by a federal grand jury after his acquittal of similar charges in State Court because, despite a previous press release from the Attorney General declaring that no such prosecutions would be brought without the Attorney General's approval, the Attorney General had not approved the indictment against the appellant. The court in *Hutul,* citing *Sullivan* as authority, observed:

> "A letter, press release, or similar statement by the Attorney General, which is not promulgated as a regulation of the Justice Department and published in the Federal Register, cannot serve to invalidate an indictment returned by the grand jury. Rather, such a provision is merely a 'housekeeping provision' of the Justice Department and is so limited in its effect." 416 F.2d at 626.

The clear implication of the Court's statement is that if the procedure resulting in an indictment does in fact violate a published regulation, the indictment should be invalidated. It is respectfully submitted that such is the case here.*

Notwithstanding the reference in the *Goldstein* opinion to the grand jury's "plenary powers", there are limitations upon the grand jury's powers. Thus, for example, a grand jury cannot return an indictment without the consent and signature of the United States Attorney. *United States* v. *Cox,* 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935.

The plain fact is that in this case all appellants were stripped without reason or justification of their clearly specified rights as provided in the IRS's own regulations to have at least one administrative conference and to be apprised of the various procedural steps as their case progressed from investigation to indictment. The Government has at no time offered any reason for this deprivation of appellants' rights at the administrative level. There is no remedy available to appellants other than dismissal of the indictment, and dismissal is not precluded by *Sullivan* in view of the fact that appellants' right to a conference is specifically provided in published regulations of the IRS.

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* The issue has been raised without decision in *Short* v. *Murphy,* 368 F.Supp. 591 (E.D.Mich. 1973), an action by a prospective defendant of a criminal tax prosecution to force the IRS to provide greater disclosure at an Intelligence conference; the Court, in rejecting the prospective defendants' action, noted:

> "We note the distinction between the actual holding of the conference envisioned by Section 601.107(b) (2) as to which we intimate no view and the extent of government disclosure at that conference once held." 368 F.Supp. at 596.

The right to such a conference was especially significant in this case, where, as noted in Point IV, presentation of appellants' defense as to their actual physical need for the truckers in issue was stymied at trial because of difficult evidentiary problems that arose during the course of the trial. During an administrative conference, no evidentiary roadblocks are present. It is respectfully submitted that appellants should have been afforded the opportunity to present this defense at the administrative level, so that the administrative authorities could have exercised an informed discretion based on appellants' presentation to them as to whether to proceed with the prosecution of this case.

POINT IV

Appellant Denti was denied a fair trial in accordance with due process by reason of the prejudicial actions of the trial Court in demeaning his defense in the presence of the jury and in erroneously hampering the presentation of his defense.

Appellant Denti adopts the argument contained in the brief of appellants Paterno and Paterno and Sons, Inc. with respect to the error claimed under this point.

Appellant Denti also adopts wherever applicable those points of law contained in the brief of appellants Paterno and Paterno and Sons, Inc.

CONCLUSION

For the foregoing reasons, the judgment of conviction against appellant George Denti should be reversed and the indictment dismissed, or, alternatively, a new trial should be ordered.

Respectfully submitted,

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